Office - Supreme Court, U. S.
FILED
JAN 27 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 690

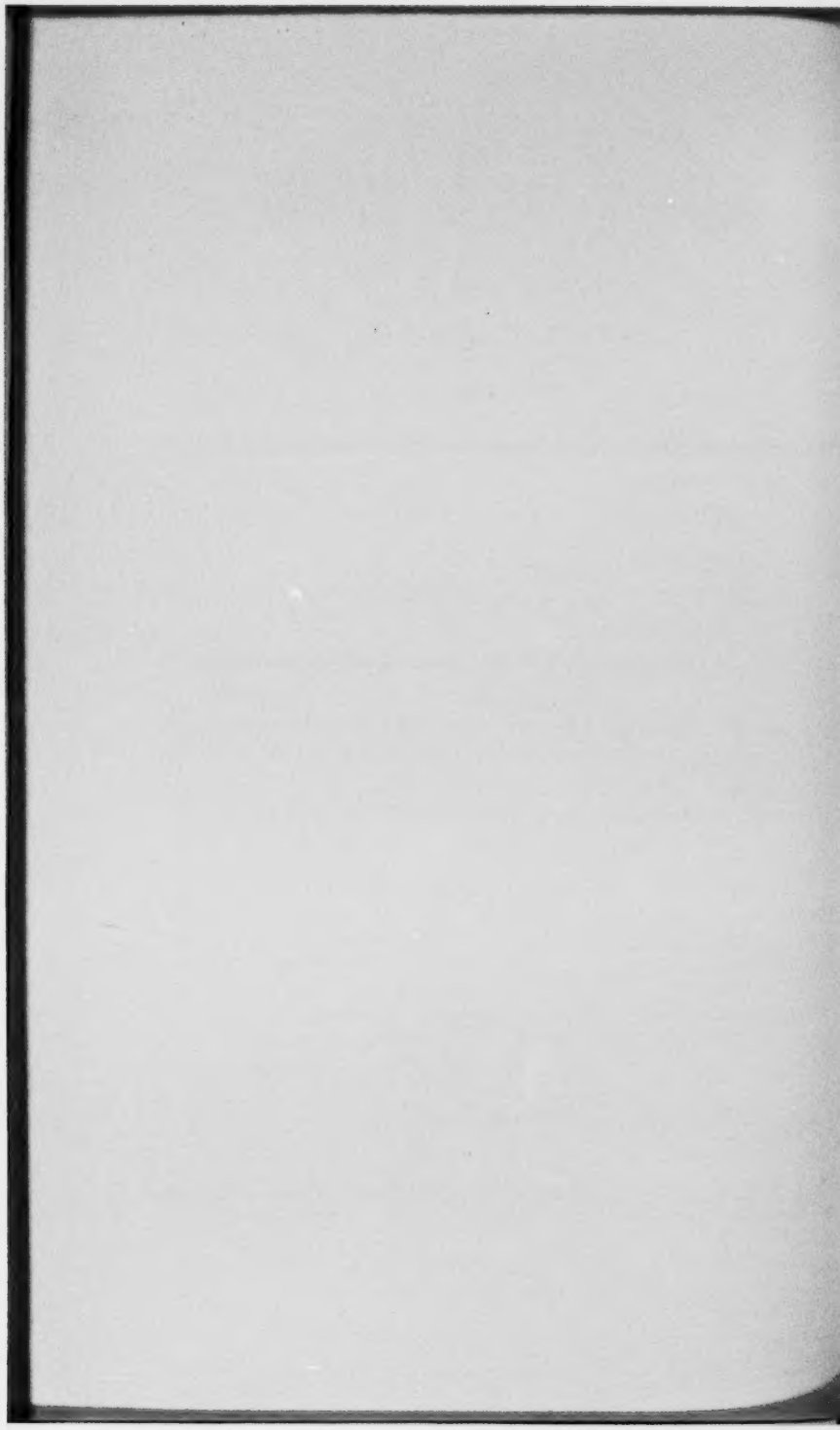
JAMES VAN GILDER,
Petitioner,
vs.
AMERICAN SURETY COMPANY,
OF NEW YORK, a New York Corporation,
Respondent.

BRIEF OF RESPONDENT, AMERICAN SURETY COMPANY OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLAYTON F. JENNINGS,
Counsel for Respondent.
Business Address:
1400 Olds Tower,
Lansing, Michigan.

SHIELDS, BALLARD, JENNINGS & TABER,
Of Counsel.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 690

JAMES VAN GILDER,
Petitioner,
vs.
AMERICAN SURETY COMPANY,
OF NEW YORK, a New York Corporation,
Respondent.

BRIEF OF RESPONDENT, AMERICAN SURETY COMPANY OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

The questions now sought to be reviewed are purely questions of law which were decided adversely to the petitioner by the United States Circuit Court of Appeals for the Sixth Circuit.

The petitioner's sole ground for granting the writ is that the decision of the Circuit Court of Appeals has decided a question of law in a way in conflict with decisions of the Michigan Supreme Court. He states this single ground in several different ways. He could not and does not allege that the decision is in conflict with that of any other circuit; that it is an *important* question of local law decided in a way probably in conflict with applicable local decisions; that it decided an important question of general law in a way probably untenable or

in conflict with the weight of authority; nor that it decided a question of great public importance which should be decided by the Supreme Court.

We deem it necessary to supplement somewhat petitioner's statement of facts, as follows:

ADDITIONAL FACTS

The bond sued upon was the statutory qualifying bond required of all sheriffs in the State of Michigan when they qualify for office under Section 1323, *Compiled Laws of Michigan,* 1929, as amended. The American Surety Company of New York, a New York corporation, respondent herein, executed the bond as surety in the form required by Section 1324, *Compiled Laws of Michigan,* 1929, which reads as follows:

> "Sec. 69. The condition of such bond shall be in substance as follows: 'Whereas, the above bounden ..... hath been elected to the office of sheriff of the county of ..... at the general election held therein (or at a special election held therein), on the ..... day of .....: Now, therefore, the condition of the above obligation is such, that if the said ..... shall well and faithfully in all things perform and execute the office of sheriff of said county of ..... during his continuance in office by virtue of the said election, without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as such sheriff, then the above obligation to be void, otherwise to be and remain in full force.' "

After Howard Sturgis was taken into custody by Sheriff John S. Barnes of Clinton County, Michigan, as stated by the petitioner, a jail limits bond was executed in favor of the Sheriff pursuant to Sections 14,729-14,732, inclusive, *Compiled Laws of Michigan,* 1929, as amended, which read as follows:

> "Sec. 22. Every person who shall be in the custody of the sheriff of any county by virtue:

1. Of any capias ad respondendum; or
2. Of any execution in a civil action; or
3. Of any attachment for the non-payment of costs; or
4. In consequence of a surrender in exoneration of his bail;

shall be entitled to the liberty of the jail limits, which limits shall be co-extensive with the limits of such county, upon executing a bond to such sheriff and his assigns, as prescribed in the next section."

"Sec. 23. Such bond shall be executed by the prisoner and one (1) or more sufficient sureties, being inhabitants and householders of the county, in a penalty, which shall be as follows:

1. It shall be not less than double the amount of the sum in which the sheriff was required to hold the defendant to bail, if he be in custody on original process, or be surrendered in exoneration of his bail before judgment docketed against him;

2. It shall be not less than double the amount directed to be levied by the attachment or execution, if he be in custody upon attachment or execution;

3. It shall be not less than double the amount for which judgment shall have been rendered against him, if he be surrendered after judgment docketed."

"Sec. 24. Such bond shall be conditioned, that the person so in custody of such sheriff, shall not at any time or in any manner, escape or go without the jail limits of the county, until legally discharged."

"Sec. 25. Every such bond taken for the liberties of any jail, shall be valid, and shall be held for the indemnity of the sheriff taking the same, and of the party at whose suit the prisoner executing such bond shall be confined" (36).

Pursuant to the mandate of the statute, Sheriff Barnes

released Howard S. Sturgis on July 7, 1934 to the jail limits, which were co-extensive with the limits of Clinton County, and in the custody of the sureties on the jail limits bond. The sureties had duly verified as to their financial responsibility pursuant to the provisions of Section 14,729, et seq., *Compiled Laws of Michigan*, 1929 (36).

While the bond was in full force and effect, Howard S. Sturgis was found outside of the limits of Clinton County on December 16, 1937, and as stated by petitioner, while he was without the jail limits, suit was instituted against Sheriff John S. Barnes, and service was obtained upon him pursuant to Sections 14,736-14,738, inclusive, *Compiled Laws of Michigan*, 1929, which read as follows:

> "Sec. 29. The going at large of any prisoner who shall have executed such bond, or of any prisoner who would be entitled to the liberties of any jail upon executing such bond, within the jail limits of the county in which he shall be in custody, shall not be deemed an escape of such prisoner; but in case any such prisoner shall go at large without the jail limits of such county without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape and forfeiture of the bond so executed, and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail."
>
> "Sec. 30. In every suit brought by a sheriff on such bond, the defendants may give notice of a voluntary return of the prisoner to the liberties of the jail from which he escaped, or a recaption of such prisoner by the sheriff from whose custody he escaped, before the commencement of such suit, and may give evidence thereof in bar of such action; and such defendants shall be entitled to make such or any other defense to such suit, which might be made by such sheriff, to an action against him for an escape."
>
> "Sec. 31. But if an action shall have been brought against such sheriff for such escape, and due notice

thereof shall have been given to the prisoner and his sureties who executed the bond for the jail liberties, the judgment against such sheriff shall be conclusive evidence of his right to recover against such prisoner and his sureties, to whom such notice was given, in the action on such bond, as to all matters which were or might have been controverted in the action against the sheriff."

Such suit, following an appeal thereof to the Supreme Court of the State of Michigan, resulted in a judgment in favor of the petitioner and against Sheriff John S. Barnes in the sum of $5,167.50. The case was reported in the reports of the Supreme Court of the State of Michigan in 288 Mich. 492, 285 N. W. 35, to which reference is made (32).

The petitioner herein did not elect to take an assignment of the jail limits bond, pursuant to Section 14,744, Compiled Laws of Michigan, 1929, which reads as follows:

"Sec. 37. If any such bond shall be forfeited, the party at whose suit the prisoner executing the same shall have been confined, or in case of his death, the executors or administrators of such party, shall be entitled to an assignment thereof, which shall be made by the sheriff taking the same, or his successor in office, or in case of a vacancy in his office, by his under-sheriff, by an indorsement thereon."

Subsequently the present action was instituted against the American Surety Company of New York, respondent herein, as stated by the petitioner. The Federal District Judge found in favor of the petitioner and against the respondent, but predicated his decision upon the erroneous belief that the judgment against Sheriff John S. Barnes was conclusive against the surety upon his official bond. That premise the District Judge stated as follows:

"The judgment of the Circuit Court for the County of Clinton has become final and is binding upon this Court. This judgment establishes that said John S. Barnes failed to faithfully perform and

execute the office of said sheriff of said county, and this decision is binding upon this Court" (62-63).

This judgment was reversed by the Circuit Court of Appeals as stated by petitioner.

QUESTION IN ISSUE

The issue before the Federal District Court and the United States Circuit Court of Appeals may be stated as follows:

Does a breach of the official bond of a sheriff result from the escape of a judgment debtor, arrested by such sheriff under capias ad satisfaciendum, but at liberty under a jail limits bond given pursuant to statute, and is the surety upon the sheriff's official statutory bond liable for the judgment recovered against the sheriff based upon such escape and pursuant to the provisions of the statute?

ARGUMENT

We do not believe that this is a cause under the rules of this Court and Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347) in which a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should issue. We realize that whether or not a writ of certiorari to the Circuit Court of Appeals should issue rests in the sound discretion of this Court, but on the other hand, while the power is coextensive with all possible necessities, it is a power which will be sparingly exercised, and only when the circumstances of the case as applied to the situation at bar, make it clear that there is a conflict between the decision of the United States Circuit Court of Appeals on a question of Michigan law and the decision of the Supreme Court of the State of Michigan upon that same question.

Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 195.

We think we can demonstrate by briefly citing and

quoting from Michigan decisions that the United States Circuit Court of Appeals for the Sixth Circuit in deciding this case was entirely in harmony with the decisions of the Supreme Court of the State of Michigan, insofar as they have passed upon the questions that may be considered to be involved in this case.

In the opinion of the Circuit Court of Appeals it was stated that the problem was one of first impression (72). The petitioner in his brief on page 6 states in effect that there is no case of the Supreme Court of the State of Michigan or any court authority directly in point, and it is, therefore, strictly speaking a case of first impression. There is, therefore, some inconsistency in petitioner's claim that the decision of the Circuit Court of Appeals is in conflict with the decisions of the Michigan Supreme Court. Be that as it may, the decisions of the Supreme Court of the State of Michigan speak for themselves.

Under the law of Michigan, as established by its Supreme Court, proceedings may be had against the sheriff and the surety on his official bond, either jointly or severally.

Doran v. Butler, 74 Mich. 643, 647, 42 N. W. 273.

When an action is brought against a sheriff upon his official bond and judgment secured, and later an action is brought upon his official bond upon the same cause of action, the question is then immediately presented as to the effect to be given to the judgment against the sheriff in establishing the liability against the surety. As eary as the case of *Norris v. Mersereau,* 74 Mich. 687, 42 N. W. 153, it was held that at the most such judgment should be given only prima facie credit. This same rule was enunciated in the cases of *McPharlain v. Fidelity & Deposit Co.,* 162 Mich. 141, 127 N. W. 307, and *Sauer v. Detroit Fidelity & Surety Co.,* 237 Mich. 697, 213 N. W. 98, 51 A. L. R. 1485, which demonstrates the error of the district judge.

The bond in suit is purely a statutory bond executed pursuant to Section 1,323, *Compiled Laws of Michigan,* 1929, as amended, the form being prescribed by statute in Sec-

tion 1,324, *Compiled Laws of Michigan,* 1929 (supra). The liability under the bond would, therefore, be measured by the statute. Under the statute and interpretations of it by the Supreme Court of the State of Michigan, there is a twofold obligation in the bond of the sheriff, (1) that he will faithfully perform the duties of his office, and (2) that he will pay over all moneys that will come into his hands as said sheriff. To render the surety upon the bond liable there must be a finding that the sheriff violated one of these conditions.

County of Lenawee v. Nutten, 234 Mich. 391, 208 N. W. 613.

The rule has been established by the Supreme Court of the State of Michigan that the surety upon the sheriff's official bond is liable to all persons unlawfully injured by nonfeasance, misfeasance or malfeasance perpetrated by the sheriff, either by virtue of office or under color of office.

Kosowsky v. Fidelity & Deposit Co., 245 Mich. 266; 222 N. W. 153;
Rostatter v. Hinchman, 243 Mich. 589, 220 N. W. 775;
Norris v. Mersereau, 74 Mich. 687, 42 N. W. 153.

It does not follow that evidence of liability on the part of the sheriff necessarily involves the surety on his official bond. An official may be liable personally, although not liable on his bond. The liability of the surety is limited by the terms of the bond and the statute pursuant to which it is given.

Davis v. Moore, 215 N. Car. 449.

There is nothing either in the statute or in the bond as written upon which it could be inferred that the surety upon the sheriff's official bond contracted with a view to becoming bound by a judgment against the sheriff. To hold the surety upon the sheriff's official bond liable, it must be affirmatively shown that there has been such a breach of a condition of the bond as to render the surety

liable for damages which it had in effect contracted to pay.

Berry v. Schaad, 59 N. Y. S. 551, 28 Misc. Rep. 389; Affirmed 63 N. Y. S. 349, 50 App. Div. 132.

The statute under which the petitioner endeavors to assert his action against the respondent is highly penal and requires strict construction.

Brady v. Hughes, 181 N. Car. 234, 106 S. E. 829.

The sheriff could only be sued when a judgment debtor prisoner escaped from the jail limits while out of his custody on a jail limits bond given to release him, because the statute provided the judgment creditor with such a remedy. And this remedy was given to the judgment creditor even though the sheriff was free from any fault in relation to the escape of the prisoner. The Supreme Court of Michigan has consistently made a distinction between an escape from the custody of the sheriff and an escape from the custody of the sureties upon a jail limits bond.

In the case of *Smith Sturgeon & Co. v. Grosslight,* 123 Mich. 86, 81 N. W. 975, it was necessary to construe the statute on a jail limits bond, and it is very instructive as to the situation before us. In the course of its opinion the Court said:

> "Grosslight was upon the jail limits of the county under a bond which provided, in substance, that he should not at any time or in any manner escape or go without the jail limits of the county of Wayne until legally discharged. *His sureties undertook, by executing the bond, to keep him within the jail limits. He was as much within the custody of the sureties on the bond as he would have been in the custody of the sheriff had he remained in jail. The jail-limits bond, in effect, is a substitute for the custody of the sheriff.*" (Italics ours).

Later on in the opinion the Court quoted from *Meredith's Admr. v. Duval,* 1 Munf. 83:

> "The bond taken by the sheriff for keeping the rules is as much a muniment of safety in behalf of the creditor as the keys of the jail are in relation to a prisoner in close custody."

The entire tenor of the opinion in the Grosslight case, though distinguishable upon the facts from the case at bar, seems to draw a clear distinction between the custody of the sheriff and the custody of the surety on the jail limits bond. The Court also said in its opinion that:

> "The rule seems, therefore, well settled, that nothing but the act of God or the enemies of the country will excuse the sheriff for an escape; and the same rule is applicable as against the sureties on the bond to the jail limits. This is also the rule of the federal courts."

Therein the Michigan Supreme Court pointed out that its application of the law was in conformity with the application of the law by the Federal Courts. The rule as to escape is very stringent, but in the Grosslight case the Court was talking about an escape from the jail limits in relation to the liability of the sureties upon the jail limits bond. It may be said that the rule is not that when the prisoner is out of close custody by virtue of a jail limits bond, that nothing but the act of God or the enemy of the country will excuse the sheriff for the escape, but rather that if there is an escape, while the prisoner is in the close custody of the sheriff, nothing but the act of God or the enemies of the country will excuse it. On the other hand, if he is out of the close custody of the sheriff by virtue of a jail limits bond, nothing but the act of God or the enemies of the country will excuse the sureties on the bond to the jail limits for the escape.

In other words, the stringent rule does not apply to the sheriff as such when the prisoner is out of his custody on a jail limits bond, but the rule is then applied against the sureties upon that bond.

In the case of *Kruse v. Kingsbury,* 102 Mich. 100, 60 N. W. 443, there is a careful review of authorities from

various jurisdictions in interpreting the statute in question and jail limits bonds given pursuant thereto. On page 105 of the report, quoting from *Cargill v. Taylor,* 10 Mass. 208, it was said:

> " 'Bonds given to entitle a prisoner to the liberties of the prison-yard are, in effect, a substitute for the custody of the sheriff. After the enlargement of the prisoner, upon the acceptance or allowance of the bond, his restraint, the custody in which he remains, is altogether of a moral nature — sense of his liability and of the responsibility of his sureties in the penalty of the bond. The consent of the creditor is not implied in the transaction. * * * *A bond regularly taken and allowed discharges the sheriff from any further responsibility for the prisoner's remaining within his custody.* The restraint to which he is subject is indeed called the custody of the jailer; not, however, as expressing his power of control or a confinement within the walls of the prison, but the bounds and limits prescribed by law, in which he is kept by the penalty of the bond.' " (Italics ours).

Later in the opinion the Court quoted from *Meredith's Admr. v. Duval,* 1 Munf. 83, as follows:

> " 'A prisoner who gives security for the prison bounds is from thenceforward no otherwise in the custody of the sheriff than as may be sufficient to protect the sheriff against any suit which the creditor may bring against him for not confining the debtor within the walls of the prison. * * * He is in the custody of the law, but the sheriff has no longer any power over him, either to restrain him or to discharge him.' "

and likewise quoting from *Lyle v. Stephenson,* 6 Call, 54, the Court said:

> " 'After the sheriff has taken a prison-bounds bond from the debtor, * * * the debtor is then in the custody of the law, and the sheriff has no power to authorize or prevent his escape.' "

The petitioner relies upon Section 14,752, *Compiled Laws of Michigan*, 1929, for statutory authority for holding the respondent herein liable. That portion of the statute is found under the subdivision of the Judicature Act entitled, "Of Escapes and Liability of Sheriffs Therefor," and reads as follows:

> "Sec. 45. If any prisoner committed to any jail, in execution in a civil action, or upon an attachment for the non-payment of costs, shall go or be at large without the jail limits of the county in which he shall have been imprisoned, without the assent of the party at whose suit such prisoners shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party for the debt, recovered in an action of assumpsit or of trespass on the case."

In this section of the statute there is no provision made for the situation where the prisoner shall escape from the jail limits when he is out of the close custody of the sheriff by virtue of a jail limits bond. Because of the penal nature of the statute and the strict construction which follows therefrom, there can not be read into the statute a like liability upon the part of the sheriff when the prisoner is at liberty on a jail limits bond. Furthermore, the statute is entirely silent as to any liability upon the part of the surety upon the sheriff's official statutory bond. No more can a provision be read into the statute that the surety upon the sheriff's official statutory bond will be liable.

The petitioner attempts to reason from analogy that, since the sureties on the sheriff's official bond are liable for the escape of a prisoner arrested under a capias ad respondendum, it must follow that the sureties upon the sheriff's official bond are liable in the situation before us; but in doing so he does not take into consideration the difference in the statute, and we think that that difference is very significant as applied to the present situation. The statute there controlling is a part of the Judicature Act pertaining to Arrest and Bail in Civil Ac-

tions. The petitioner quotes a portion of the statute. The entire section of the statute reads as follows:

> "Sec. 13. If, in any such action, after a reasonable time, the sheriff or other officer shall not satisfy the plaintiff in the action the amount due him, with costs and interest, the court shall award execution on the judgment against such sheriff or other officer; and if such execution be returned unsatisfied, in part or in whole, *the same proceedings shall be had on the official bond of such sheriff* or other officers to collect such deficiency, as in other cases of delinquency." (Italics ours).

There it is to be seen that the statute specifically provides that the surety upon the official bond of the sheriff shall be liable. Also there was involved an entirely different kind of an escape than we have in the case at bar. The kind of escape involved in that section of the statute would necessarily be the result of either malfeasance, misfeasance or nonfeasance in office by the sheriff.

The petitioner relies upon the Michigan case of *Wilson & Co. v. Franz,* 206 Mich. 581, 173 N. W. 541. That case did not involve the liability of a surety either upon the sheriff's official bond or upon the jail limits bond. It simply held that by virtue of the statute the judgment creditor had a right to sue the sheriff by virtue of the statute if the judgment creditor was found without the jail limits while out of his custody on a jail limits bond, and pointed out that the judgment creditor had the right to elect either to sue the sheriff or to accept an assignment of the jail limits bond and sue the sureties thereon.

The case of *South v. State of Maryland,* 18 Howard 396, 15 L. Ed. 433, cited by petitioner on page 11 of his brief, fully supports the argument of respondent.

In view of the authorities we have quoted and cited, it seems to be clear that insofar as the Michigan Supreme Court has spoken upon the subject the surety upon a sheriff's statutory official bond is only liable upon affirmative proof of an act of nonfeasance, misfeasance or malfeasance. There is no allegation in the pleadings,

nor any proof in the record in this case, of any such acts. There was nothing that the sheriff could have done to have prevented the escape in question. The prisoner was out of his custody, was beyond his control, and the sheriff is only liable because the statute makes him subject to suit and judgment as a means of assisting the creditor to collect his judgment. There is nothing in the contract as expressed in the statutory official bond to indicate that the surety contracted for the liability sought to be imposed upon it by the petitioner.

Under mandate of the statute the sheriff was obliged to permit the prisoner the liberty of the jail limits upon the furnishing of a proper jail limits bond. The bond furnished indemnified the sheriff against loss by reason of his statutory liability for an escape, but the surety on the sheriff's official bond did not contract to indemnify any one for an escape, except as such escape might be due to some breach of the obligation of the sheriff to well and faithfully perform and execute the duties of his office. It was certainly beyond the contemplation of the surety in the case at bar on the sheriff's official bond that it would be liable for an escape when the sheriff was required to permit the prisoner to be at liberty upon a jail limits bond.

CONCLUSION

The Circuit Court of Appeals for the Sixth Circuit by its decision in the case at bar did not establish a principle of law in conflict with either the statutory law of Michigan or the law of Michigan as established by its Supreme Court. Its decision was entirely in harmony with the decisions of the Supreme Court of the State of Michigan in relation to the statute involved. It, therefore, follows that the ground upon which the petitioner rests his case for the granting of a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is without foundation.

We, therefore, pray that the petition be denied.

Respectfully submitted,

CLAYTON F. JENNINGS,
Attorney for Respondent.

SHIELDS, BALLARD, JENNINGS & TABER,
Of Counsel.